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15 Of Attorneys for Rhode Island Suburban Newspapers,
16 Inc.

17 **UNITED STATES BANKRUPTCY COURT**
18 **DISTRICT OF OREGON**

19 In re
20 Western Communications, Inc.
21 Debtor.

22 Case No. 19-30223-tmb11

23 **REQUEST FOR PAYMENT OF**
24 **BREAK-UP FEE FROM PROCEEDS**
25 **OF BEND SALE (EXPEDITED)**

26 **Hearing: July 29, 2019 at 1:30 p.m.**

27 Rhodes Island Suburban Newspapers Inc. (“RISN” or “Buyer”), by and through its
28 undersigned counsel, hereby requests payment of the “Break-Up Fee” arising from the Bend
29 sale transaction, which sale is scheduled for hearing on July 29, 2019 at 1:30 p.m., for the
30 following reasons:

31 **I. INTRODUCTION**

32 1. RISN seeks approval of the Break-Up Fee it negotiated as part of the stalking
33 horse offer it submitted for the “Bend Assets” (defined below). The purchase agreement
34 between RISN and the Debtor guaranties a sale for the Bend Assets for a purchase price of
35 \$2.25 million and requires competing bidders to produce higher and better offers, including
36 cash in the amount of \$67,500 to pay the Break-Up Fee. The Debtor in fact received two

1 competing bids (both bids based on the form of RISN's purchase agreement) and will sell the
2 Bend Assets for no less than \$2.5 million. There are no objections to the Bend sale.
3 Accordingly, in the event this Court approves a sale to a party other than RISN, the Break-Up
4 Fee should be approved and paid from the sale proceeds.

5 **II. FACTUAL BACKGROUND**

6 2. RISN and Western Communications, Inc., the debtor ("Debtor" or "Seller") in
7 the above-captioned chapter 11 proceedings (the "Bankruptcy Case"), entered into that
8 certain Bend Asset Purchase Agreement (the "APA"). The Debtor filed an executed copy of
9 the APA with the Court on July 3, 2019 [Docket No. 194].

10 3. Under the APA, RISN offered to buy substantially all of the Debtor's assets
11 related to "the printing, publishing and distributing of Seller's The Bulletin daily newspaper,
12 Redmond Spokesman weekly newspaper, TMC weekly publication, Go! weekly
13 entertainment tabloid, Bend Homes monthly vertical, Area 97 bi-monthly magazine and
14 Pulse quarterly magazine and certain related websites" (collectively, the "Bend Business")
15 for a cash purchase price of \$2,250,000. (APA, pp. 1, 3).

16 4. RISN and the Debtor agreed the purchase offer would be subject to an auction
17 process and agreed to certain conditions for such process to both (a) ensure that the Debtor
18 obtained the highest and best price possible for the Bend Business, and (b) compensate RISN
19 for setting a floor for the sale and guarantying a set amount of consideration for the sale.
20 Among other things, as part the auction process, the parties agreed and the APA provides:

- 21
- 22 a. **If Buyer is not the successful purchaser and an Alternative Transaction is**
23 **approved by the Bankruptcy Court, Buyer will be entitled to a return of the**
24 **Deposit and, subject to Bankruptcy Court approval, will be entitled to**
receive a cash payment in the amount of Sixty-Seven Thousand, Five-
Hundred U.S. dollars (\$67,500) (the "Break-Up Fee");
- 25 b. Competing bidders will be required to overbid as follows: The first competing
26 bidder must bid an initial amount of at least One Hundred Thousand U.S. dollars

1 (\$100,000.00) in cash over the Purchase Price. Any subsequent bidder, including
2 Buyer, must bid in bid increments of at least Fifty Thousand U.S. dollars
3 (\$50,000.00) over the most recently submitted bid. **Buyer shall be entitled to**
4 **credit bid, at each round of the auction, the amount of the Break-Up Fee;**

5 c. Competing bidders must demonstrate the ability to pay the Purchase Price in cash
6 at Closing; and

7 d. **Competing bidders (other than Buyer) will be required to deposit the sum of**
8 **Sixty-Seven Thousand, Five Hundred U.S. dollars (\$67,500) in cash (to cover**
9 **the Break-Up Fee) and an additional deposit of 10% of their proposed**
10 **purchase price,** and deliver to Seller a signed copy of this Agreement, marked to
11 show such bidder's proposed changes, in order to confirm a commitment to
12 proceed with the purchase.

13 (Collectively, the "Auction Process"). (APA, Art. 10).

14 5. The Debtor filed its sale motion for the Bend Business pursuant to the APA on
15 June 28, 2019 [Docket No. 184] (the "Sale Motion"). Consistent with the Auction Process,
16 the Sale Motion required that competing bids be submitted by July 15, 2019 (the "Overbid
17 Date") and that such bids must exceed the consideration provided under the APA "by at least
18 \$100,000, and be on the same or more favorable terms to the estate." (Sale Motion, ¶9). In
19 addition, the Debtor indicated that all expenses of the sale of the Bend Business would be
20 paid from the sale proceeds. (Sale Motion, ¶11).

21 6. The Debtor filed that certain Notice of Overbids and Auction (Bend Bulletin)
22 on July 22, 2019 [Docket No. 205] (the "Notice"). As set forth in the Notice, no party timely
23 filed an objection to the sale of the Bend Business, and the Debtor received two qualified
24 bids by competing bidders under the Auction Process and by the Overbid Date. (Notice,
25 p.2).

26 7. The Debtor identified an overbid by East Oregonian Publishing Company
(dba EO Media Group) as the highest and best bid pursuant to a purchase agreement attached
to the Notice. EO Media Group's current bid includes a cash purchase price of \$2,500,000
and additional consideration. (Notice, Ex. A, p 7).

1 8. Based on the competing bids timely received by the Debtor under the Auction
2 Process, the Debtor intends to hold an auction for the Bend Business immediately prior to the
3 hearing on the Sale Motion (the “Sale Hearing”).

4 **III. ARGUMENT – SUPPORT FOR PAYMENT OF BREAK-UP FEE**

5 9. Regardless of the outcome of the auction, the Debtor will obtain a purchase
6 price for the Bend Business no less than \$2,500,000, which is \$250,000 greater than the
7 guaranteed purchase price RISN provided under the APA. The Break-Up Fee thus represents
8 less than 3% of the total consideration the Debtor will receive for the Bend Business. RISN
9 has successfully acted as a catalyst or “stalking horse” to attract higher and better offers for
10 the Bend Business, and thereby maximized revenue and value for the Debtor’s estate. RISN
11 therefore respectfully requests the Court approve the Break-Up Fee at the Sale Hearing.

12 10. The Debtor and RISN negotiated the Break-Up Fee to induce RISN to submit
13 its offer for the Bend Business within the time frame mandated by the Debtor’s business
14 circumstances. The proposed Break-Up Fee is fair and reasonable in relation to the
15 competing Overbids received and thus maximized the benefit to the estate by providing an
16 incentive to potential purchasers to expend the resources necessary to formulate offers for the
17 Bend Business in excess of the RISN’s offer. *See, e.g., In re Kirk Corp.*, No. 09 B 17236,
18 2009 WL 6769950, at *16 (Bankr. N.D. Ill. July 30, 2009) (approving break-up fee and
19 overbid protection); *In re CXM, Inc.*, 307 B.R. 94, 103-04, 106 (Bankr. N.D. Ill. 2004)
20 (awarding break-up fee and noting that it “makes economic sense” to establish overbid
21 protections as well); *In re Kmart Corp.*, Case No. 02-B-02474 (Bankr. N.D. Ill. Aug. 29,
22 2002) (authorizing break-up fee and overbid protections).

23 11. RISN expended time, effort, and expense to conduct due diligence and
24 negotiate the APA. By guaranteeing a minimum sale price and allowing the Debtor to seek
25 higher and better offers, RISN took the risk that “another party will come in and outbid
26 [RISN] and all that time and money will have been spent for naught,” *Beebe v. Pacific Realty*

1 *Trust*, 578 F. Supp. 1128, 1150 n. 7 (D.Or.1984) (quoting A Leveraged Buyout: What It
2 Takes, Business Week, July 18, 1983, at 194, 198). Because this risk is common among
3 potential buyers in bankruptcy cases, “breakup fees are often part of the deal.” *In re S.N.A.*
4 *Nut Co.*, 186 B.R. 98, 101 (Bankr. N.D. Ill. 1995).

5 12. “Agreements to provide breakup fees or reimbursement of fees and expenses
6 are meant to compensate the potential acquirer who serves as a catalyst or ‘stalking horse’
7 which attracts more favorable offers.” *Id.*; see also *In re 995 Fifth Ave. Assocs., L.P.*, 96
8 B.R. 24, 28 (Bankr. S.D.N.Y. 1992) (bidding incentive may “be legitimately necessary to
9 convince a ‘white knight’ to enter the bidding by providing some form of compensation for
10 the risks it is undertaking”) (internal citation omitted); *In re Marrose Corp.*, Nos. 89 B
11 12171-12179 (CB), 1992 WL 33848 at *5 (Bankr. S.D.N.Y. 1989) (“[bidding incentives] are
12 meant to compensate the potential acquirer who serves as a catalyst or ‘stalking horse’ which
13 attracts more favorable offers”).

14 13. In the bankruptcy context, the test for determining whether a proposed Break-
15 Up Fee should be approved is whether it is in the best interests of the estate. See *S.N.A. Nut*.
16 *Co.*, 186 B.R. at 104; see also *In re ASARCO, L.L.C.*, 650 F.3d 593, 600-03 (5th Cir. 2011);
17 *In re Tiara Motorcoach Corp.*, 212 B.R. 133, 137 (Bankr. N.D. Ind. 1997) (adopting the
18 standards set forth in *S.N.A. Nut Co.*); *In re Am. W. Airlines, Inc.*, 166 B.R. 908, 912 (Bankr.
19 D. Ariz. 1994); *In re Hupp Indus., Inc.*, 140 B.R. 191, 196 (Bankr. N.D. Ohio 1992). In
20 particular, a court should evaluate whether a break-up fee will maximize revenues and the
21 value to be brought into the debtor’s estate. See *S.N.A. Nut Co.*, 186 B.R. at 105-06; *Tiara*
22 *Motorcoach*, 212 B.R. at 137.

23 14. The Break-Up Fee satisfies this standard. The primary circumstances
24 compelling allowance of the Break-Up Fee have already occurred. RISN facilitated the
25 commencement of the bidding process as quickly as possible, so that a transaction can be
26

1 consummated promptly considering the business circumstances facing the Debtor and its
2 operations.

3 15. By offering the Break-Up Fee the Debtor was able to ensure the sale of the
4 Bend Business to a contractually committed bidder, at a price the Debtor believed to be fair,
5 while providing the Debtor with the potential of even greater benefit to its estate. The Break-
6 Up Fee therefore should be approved. The Auction Process facilitated by RISN, its APA and
7 the Break-Up Fee in fact produced higher and better offers, that will net the estate an amount
8 greater than RISN's purchase price after payment of the Break-Up Fee.
9

10 **IV. REQUEST FOR EXPEDITED HEARING**

11 16. The present motion relates directly to the Sale Motion, for which a sale
12 hearing is scheduled for July 29, 2019 at 1:30 p.m. By this motion, RISN requests that any
13 order approving the sale of the Bend Assets provide for the payment of the Break-Up, in
14 cash, to RISN from the sale proceeds. The results of the auction are unknown as of the date
15 of this motion. Accordingly, the RISN submits that this motion should be heard at the same
16 time as the Sale Motion, and has filed this motion on an expedited basis.

17 17. Pursuant to LBR 7007-1(c) and 9013-1(a)(2), counsel for RISN has discussed
18 the request for expedited relief with counsel for both the Debtor and its secured lender,
19 Sandton Credit Solution Master Fund III, LP, whose liens are in excess of the proposed sale
20 price. Neither party contests the request to have this matter heard on an expedited basis.

21 **WHEREFORE**, Rhodes Island Suburban Newspapers Inc. respectfully requests that
22 this Court enter a sale order that includes payment of the Break-Up Fee, in cash, to RISN at
23 the closing of the sale of the Bend Business, and granting such other and further relief as this
24 Court deems just and proper.
25
26

1 DATED this 25th day of July 2019.

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16 *Of Attorneys for Rhode Island Suburban*
17 *Newspapers, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing

REQUEST FOR PAYMENT OF BREAK-UP FEE FROM SALE PROCEEDS OF

BEND SALE upon all ECF participants registered with the Court to receive electronic notice
as of the date of the entry of this pleading electronically via CM/ECF System:

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A Supplemental Certificate of Service will be filed on July 26, 2019 to

comply with LBR 7007-1(c) and 9013-1(a)(2).

DATED this 25th day of July, 2019.

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